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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 CLYDE ELLIS,

12 Petitioner,

13 v.

14 THE PEOPLE,

15 Respondents.  
16

Case No.: 16CV688 BEN (BGS)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

17 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of  
18 Habeas Corpus pursuant to 28 U.S.C. § 2254.

19 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

20 Petitioner has failed to either pay the \$5.00 filing fee or move to proceed in forma  
21 pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee  
22 or qualified to proceed in forma pauperis. *See* Rule 3(a), 28 U.S.C. foll. § 2254.

23 **FAILURE TO NAME PROPER RESPONDENT**

24 Review of the Petition reveals that Petitioner has failed to name a proper  
25 respondent. On federal habeas, a state prisoner must name the state officer having  
26 custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir.  
27 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction  
28 when a habeas petition fails to name a proper respondent. *See id.*

1 The warden is the typical respondent. However, “the rules following section 2254  
 2 do not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the  
 3 warden of the institution in which the petitioner is incarcerated . . . or the chief officer in  
 4 charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254  
 5 advisory committee’s note). If “a petitioner is in custody due to the state action he is  
 6 challenging, ‘[t]he named respondent shall be the state officer who has official custody of  
 7 the petitioner (for example, the warden of the prison).’” *Id.* (quoting Rule 2, 28 U.S.C.  
 8 foll. § 2254 advisory committee’s note).

9 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a  
 10 writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is  
 11 in custody. The actual person who is [the] custodian [of the petitioner] must be the  
 12 respondent.” *Ashley v. Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement  
 13 exists because a writ of habeas corpus acts upon the custodian of the state prisoner, the  
 14 person who will produce “the body” if directed to do so by the Court. “Both the warden  
 15 of a California prison and the Director of Corrections for California have the power to  
 16 produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d at 895.

17 Here, Petitioner has incorrectly named “The People,” as Respondent. In order for  
 18 this Court to entertain the Petition filed in this action, Petitioner must name the warden in  
 19 charge of the state correctional facility in which Petitioner is presently confined or the  
 20 Director of the California Department of Corrections. *Brittingham v. United States*, 982  
 21 F.2d 378, 379 (9th Cir. 1992) (per curiam).

## 22 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

23 Further, habeas petitioners who wish to challenge either their state court conviction  
 24 or the length of their confinement in state prison, must first exhaust state judicial  
 25 remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).  
 26 Ordinarily, to satisfy the exhaustion requirement, a petitioner must “‘fairly present[]’ his  
 27 federal claim to the highest state court with jurisdiction to consider it, or . . .  
 28 demonstrate[] that no state remedy remains available.” *Johnson v. Zenon*, 88 F.3d 828,

829 (9th Cir. 1996) (citations omitted). Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)(emphasis added).

Nowhere on the Petition does Petitioner allege that he raised his claims in the California Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so specify.

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation applies to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period runs from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006

(9th Cir. 1999); *but see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).


Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas relief because he has not alleged exhaustion of state court remedies.

### **CONCLUSION**

For the foregoing reasons, the Court **DISMISSES** this case without prejudice and with leave to amend. If Petitioner wishes to proceed with this case, he must, **no later than May 30, 2016**: (1) pay the \$5.00 filing fee **OR** submit adequate proof of his inability to pay the fee; **AND** (2) file a First Amended Petition that cures the pleading deficiencies outlined in this Order. *The Clerk of Court shall send a blank Motion to Proceed in Forma Pauperis Application and a blank First Amended Petition form to Petitioner along with a copy of this Order.*

**IT IS SO ORDERED.**

Dated: March 30, 2016

  
 Hon. Roger T. Benitez  
 United States District Judge